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Ontario Labour Relations Board HIGHLIGHTS

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NOTICES TO THE COMMUNITY

Holiday Season Board Schedule
The Board's holiday operations schedule is attached.

School Boards Collective Bargaining Act, 2014
Forms for applications under the SBCBA are now available on the Board's website.

New Vice-Chair
The Board is pleased to welcome **Michael McFadden** as a full time Vice Chair of the Board, effective November 2014. Prior to joining the Board, Michael was a partner at the Toronto office of Norton Rose Fulbright Canada LLP with an exclusive focus on employment and labour law on behalf of employer and management clients. Before his career at Norton Rose, Michael practised labour law at Koskie Minsky LLP on behalf of trade union clients. While in private practice, Michael regularly appeared as an advocate before the Board, other employment and labour tribunals and all levels of court in Ontario. Michael holds a Bachelor of Arts and a Bachelor of Laws degree from Queen's University.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in November of this year. These decisions will appear in the November/December issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Change in Working Conditions – Collective Agreement – Grievance – Practice and Procedure – CUPE alleged the various school boards had violated the freeze provisions of the Act by laying off FTEs contrary to the parties' respective collective agreements and letters of understanding – Grievances had been filed in all instances, but were being held in abeyance – The school boards sought deferral of the issue to arbitration; CUPE argued that the Board should assume jurisdiction to prevent multiple proceedings as well as the risk of inconsistent decisions – The Board acknowledged that there is complete congruence between the contractual interpretation issue and the alleged breach of the Act – The Board held that there was no suggestion that the collective bargaining process was being undermined or otherwise repudiated – An arbitrator clearly has jurisdiction to deal with the grievances and the alleged violation of the freeze provisions under s. 86(3) of the Act, and the arbitrator is empowered to look at not only the contractual obligations between the parties but the extent and implications of the letters of understanding – It would be artificial for the Board to look only at s. 86(1) without also engaging in analysis of the parties' other rights, duties, privileges and obligations – Matters adjourned

ALGOMA DISTRICT SCHOOL BOARD ET AL; RE: Canadian Union of Public Employees; RE: The Crown in Right of Ontario as represented by the Ministry of Education; OLRB File No: 1995-14-U; Dated: November 27, 2014; Panel: Mathew R. Wilson (14 pages)

Bargaining Unit – Certification – The Board was asked to determine whether the volunteer firefighters in one fire station could constitute an appropriate bargaining unit when the amalgamated municipality had only two fire stations – The question to be answered was: would certifying the unit applied for cause serious labour relations problems for the municipality? – The Board found that although there was some mutuality between the stations (training, both stations responding to calls, limited transfer of employees), none of these issues would adversely affect labour relations – Similarly, the Board did not accept the municipality's argument about fragmentation – Bargaining unit found to be appropriate – Parties to advise if there are other outstanding issues

CORPORATION OF THE MUNICIPALITY OF BAYHAM; RE: Teamsters Local Union No. 879; OLRB File No. 2649-13-R; Dated November 14, 2014; Panel: Roslyn McGilvery, R. O'Connor and D.A. Patterson (15 pages)

Construction Industry Grievance – Reconsideration – The employer sought reconsideration of a default ruling against it – The Board held that the employer's explanation for failing to file a Notice of Intent to Defend was inadequate, as was its assertion that a Voluntary Recognition Agreement from 1981 was invalid because the signatory had no authority to sign on behalf of the employer – The Board was satisfied, however, that the employer had pleaded sufficient facts to establish abandonment as a real and substantial defence, and the matter was of sufficient importance to the ongoing relationship of the parties that it should be litigated – Reconsideration granted; matter referred to Registrar for hearing

EXECWAY CONSTRUCTION LIMITED; RE: United Brotherhood of Carpenters and Joiners of America, Local 397; OLRB File No. 2091-14-G; Dated November 25, 2014; Panel: Lee Shouldice (8 pages)

Jurisdictional Dispute – The employer re-assigned responsibility for certain tasks following the release of a Board decision with similar facts (*Black & McDonald*) – The issue was material handling of certain equipment – The Board found that in *B&M* how the equipment was defined dictated who had the jurisdiction to move it – The Board found that the employer in the instant case could have defensibly assigned the work in dispute to either of the unions at the beginning of the project, depending on how the work was bundled – But there was no compelling reason to shift the work from one union to the other after it had been assigned and was under way, even in the face of the ruling in *B&M*

H.B. WHITE CANADA CORP.; RE: Labourers' International Union of North America, Local 493; RE: International Brotherhood of Electrical Workers, Local 1687; RE: International Union of Operating Engineers, Local 793; OLRB File No. 3303-13-JD; Dated November 3, 2014; Panel: David A. McKee (22 pages)

Health and Safety – OPSEU appealed and sought the suspension of the rescission of a number of Ministry orders – The Board found that the rescission of the original orders meant the employer was not required to do anything – A rescission is akin to a non-order – While the refusal to issue an order can be the subject of an appeal, subsection 61(7) of the OHSA cannot be relied on to require an employer to comply with a rescinded order pending appeal – That would be tantamount to varying the order, a power available to the Board only on an appeal – Application for suspension dismissed

HER MAJESTY THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CHILDREN AND YOUTH SERVICES; RE: Ontario Public Service Employees Union; OLRB File Nos. 1700-14-HS and 1701-14-HS; Dated November 26, 2014; Panel: Roslyn McGilvery (4 pages)

Construction Industry Grievance – Human Rights Code – Remedies – Termination – Local 493 alleged that one of its members was terminated without just cause – The employee was a senior civil foreperson who was transferred to the Northeast Region after seven years in the Central Region – Soon after the transfer, the employee began exhibiting erratic behaviour, culminating in an arrest for drunk driving a company vehicle and subsequent termination from his position – The Board accepted evidence that the employee suffered from an alcohol addiction-

related disability – In its analysis, the Board gave less weight to earlier incidents of erratic behaviour as they did not result in any formal disciplinary record on the part of the employee – The Board found that while the company had cause to discharge the employee, a lesser penalty would be appropriate in the circumstances – Subject to specific terms and significant conditions, the Board ordered that the discharge be substituted for a suspension, and that the employee be reinstated to active employment as a senior supervisor – The employee's continued employment at Hydro One Inc. would be conditional on his adherence to the terms and conditions outlined by the Board – Grievance allowed in part

HYDRO ONE INC.; RE: Labourers' International Union of North America, Ontario Provincial District Council; RE: Labourers' International Union of North America, Local 493; OLRB File No. 2331-12-G; Dated November 3, 2014; Panel: Patrick Kelly (21 pages)

NOTE: On November 12, 2014, the Board issued a subsequent decision correcting a finding that the employee had been convicted of a criminal offence – The impaired driving charges had actually been dropped, and the employee was convicted of careless driving

HYDRO ONE INC.; RE: Labourers' International Union of North America, Ontario Provincial District Council; RE: Labourers' International Union of North America, Local 493; OLRB File No. 2331-12-G; Dated November 12, 2014; Panel: Patrick Kelly (2 pages)

Bargaining Unit – Practice and Procedure – Representation Vote – Termination – Employees of Barrette applied for a declaration that CLAC is no longer their bargaining agent – Both CLAC and the intervenor asserted the application was untimely – The application had been filed six months and one day after CLAC had been certified, and on the date that a collective agreement became effective – A representation vote was held and the ballot box sealed – The Employees asked that the Board unseal the ballot box and count the ballots before a determination on the timeliness of the application – Employees submitted that if the ballots were counted and not more than 50% were cast against being represented by CLAC, then the litigation would come to an immediate end, saving the parties and the Board further expense – CLAC submitted that even if the vote was counted, it could not be given effect if the application was subsequently found to be untimely – It further argued that a union is entitled under the Act to a period of calm after certification, and that the results of the vote would compromise its ability to act as the employees' exclusive bargaining unit – The Board found that there was a significant risk of labour relations harm and prejudice if CLAC had to address an adverse vote before the timeliness issue was resolved – The possibility of sparing the parties and the Board costs and resources was not a sufficient reason to open the ballot box – Although counting the ballots is often encouraged in mediation, the Board found it inappropriate to force parties into accepting the risks associated in doing so solely for the purpose of convenience and cost-saving – The Board determined that CLAC's ability to continue to discharge its responsibilities as the employees' exclusive bargaining agent would be significantly impaired if the vote was counted and found to be against them – Motion to unseal the ballot box and count the ballots dismissed

J.G. BARRETTE ELECTRIC LTD.; RE: Marc Andre Turpin and Other Employees of J.G. Barrette Electric Ltd.; RE: Christian Labour Association of Canada (CLAC); OLRB File No. 1626-14-R; Dated November 21, 2014; Panel: Harry Freedman (10 pages)

Certification – Parties – Practice and Procedure – Unfair Labour Practice – The responding parties moved to remove H and S as individual responding parties in their personal capacity – The applicant argued that it is entitled to name any party it wishes in an application, and that the unfair labour practice provisions of the Act can all be violated by "persons" or "persons acting on behalf of an employer" - The Board found that H and S were both acting in their capacity as management employees and they were not rogue actors – The Board held that although there was no provision of the Act deeming an employer generally vicariously liable for the actions of its employees (as there is in the *Human Rights Code*), it has never had difficulty finding an employer liable for the actions of its managers – The unnecessary naming of individuals adds needless complexity to a proceeding unless there is an adjudicative or labour relations purpose for naming the individual – Motion granted; matter continues

RISE REAL ESTATE INC.; RE: Brick and Allied Craft Union of Canada; OLRB File Nos. 0823-14-R and 0843-14-U; Dated November 3, 2014; Panel: Jesse M. Nyman (10 pages)

Charter of Rights and Freedoms – Health and Safety – Interim Relief – Standing – ONA

applied for two interim orders to increase workplace safety at the Brockville Mental Health Centre, the forensic psychiatric care unit of the hospital, in which persons accused under the *Criminal Code* receive treatment for mental health issues – A Registered Nurse suffered critical injuries after being stabbed with a pen several times by a patient who had been previously incarcerated for violent crimes – An MOL inspector issued several orders relating to reporting requirements and safety assessments to be conducted by the employer – The patient was moved to a locked seclusion room, but nurses continued to be subjected to violence in the course of their duties treating the patient – ONA sought further orders to have properly trained security guards in the psychiatric unit at all times, and to have the patient involved in the attack moved to a secure room with access limited to a single window hatch – The hospital claimed that the ONA had not met the threshold for interim relief, and argued the patient in question should have standing at the hearing given the potential of a violation of section 7 rights under the Charter – MOL agreed that the patient should have standing, and opposed the request for interim orders in the absence of more information relating to possible alternatives – The Board ruled that the transferred patient was not entitled to standing, since these are issues of institutional personal safety and not simply matters limited to this patient – The Board further directed that the hospital place an adequate number of security professionals in the psychiatric unit – The Board emphasized the statutory duty of the employer to protect the health and safety of its workers, and that costs were not an acceptable objection to fulfilling this duty – The Board was not satisfied that the order requesting to move the patient to a secure room was appropriate – Application allowed in part

ROYAL OTTAWA HEALTH CARE GROUP – BROCKVILLE MENTAL HEALTH CENTRE; RE: Ontario Nurses' Association, Applicant; RE: Director under the Occupational Health and Safety Act; OLRB File Nos. 2461-14-HS and 2461-14-IO; Dated November 26, 2014; Panel: Kelly Waddingham (12 pages)

Certification – Construction Industry – Intimidation and Coercion – Representation Vote – During an organizing campaign, the union's organizer told an employee that he could not guarantee that if the employee failed to sign a card, he would be ensured employment with the employer if the union was successful in its application for certification – The Board found that this statement did not reflect the organizer's personal view, but his business manager's – In the circumstances, the Board did not find that the organizer had violated s. 76 of the Act – The Board was not satisfied, however, that the membership evidence filed with the Board represented the true wishes of the employees – The Board exercised its discretion and ordered a representation vote – Matter continues

SENTRY ELECTRICAL (CANADA) ULC; RE: International Brotherhood of Electrical Workers, Local 120; RE: Group of Employees; OLRB File No. 0505-14-R; Dated November 28, 2014; Panel: Eli A. Gedalof (12 pages)

COURT PROCEEDINGS

Collective Agreement – Construction Industry Grievance – Damages – Estoppel – Judicial Review – The unions appealed a ruling of the Divisional Court quashing a Board decision which had found that the Provincial Collective Agreement was enforceable as between EllisDon and the unions (after applying a two-year estoppel), relying on the existence of a 1958 document, the Sarnia Working Agreement – A majority of the Divisional Court held that the Board was unreasonable and erred in law in accepting the business records rule and the ancient document rule to find that the SWA was proven, and that only a permanent estoppel was reasonable in the circumstances, in any event – On appeal, the Court of Appeal allowed the appeal and restored the decision of the Board – The Court stated that the adequacy of reasons is no longer a stand-alone basis for judicial review of an expert tribunal; there was nothing unreasonable in the Board's chain of reasoning about the admissibility of the SWA (notwithstanding that the Board had not adverted to the admissibility provisions of the LRA); and, finally, the Board's reasons were not sparse, nor was its logic hidden: the reasons clearly allowed the reviewing court to understand why the Board made its decision and permitted the court to determine whether the Board's conclusion was within the range of acceptable outcomes – Moreover, the tests considered by the Board for admitting the SWA as a business record or an ancient document were more rigorous than any test under sections 48 or 111 of the LRA – On the issue of the Board's imposition of a two-year estoppel, the Court of Appeal found the Divisional Court erred in failing to show due deference in finding the Board's remedy to be unreasonable and substituting a permanent estoppel – Appeal allowed; Board decision restored

ELLISDON CORPORATION; RE: Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586; RE: Ontario Labour Relations Board; OLRB File No. 0784-05-G and 2836-08-G; Court File No. C58371; Dated November 17, 2014; Panel: MacFarland, LaForme and Lauwers, JJ.A. (28 Pages)

Judicial Review – Reasonable Apprehension of Bias – The Court of Appeal held that the Divisional Court had applied the wrong test in disqualifying the Vice-Chair from presiding over a proceeding before the Board – The Divisional Court applied a test relating to the conflict of interest of a lawyer, stemming from the existence of a fiduciary relationship and a duty of loyalty owed to the client – The proper test is set out by the Supreme Court in *Wewaykum Indian Band*, which addresses a claim of apprehension of bias and includes a strong presumption of impartiality – The Divisional Court failed to apply the presumption of impartiality and failed to conduct a contextual analysis – Considering reasonable apprehension of bias anew, the Court of Appeal reinstated the Board's decision – The Court of Appeal also rejected allegations that procedural fairness had been denied and that the Vice-Chair's exercise of discretion not to inquire into the matter was unreasonable – Appeal allowed; Board decision restored

DURVAL TERCEIRA, ET AL; RE: Labourers International Union of North America; RE: Universal Workers Union- Labourers International Union of America Local 183; RE: Service Employees International Union Local 2; RE: Brewer General and Professional Workers' Union; RE: Ontario Labour Relations Board; OLRB File No. 1475-11-U; Court File No. C58059 and C58146; Dated November 26, 2014; Panel: Feldman, Blair and Pepall JJ.A. (21 Pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	Pending
College Employer Council Divisional Court No.397/14	1143-14-CV	Pending
Dean Warren Divisional Court No.345/14	2336-13-U	Pending
LIUNA- Trisan Divisional Court No.342/14	2620-13-G 2001-13-G et al	Pending
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Bogdan Koscik Divisional Court No. DC-14-000636-00JR **(Newmarket)**	0956-13-U	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	February 20, 2015
Mary McCabe Divisional Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	April 27, 2015
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Durval Terciera, et al Court of Appeal No. C 58059 & C58146	1475-11-U	Allowed Board Decision restored November 26/14
EllisDon Corporation Court of Appeal No. C58371	0784-05-G	Allowed Board Decision restored November 17/14

EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above